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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

In re CONSECO INSURANCE CO.  
ANNUITY MARKETING & SALES  
PRACTICES LITIG.

No. C-05-04726-RMW

CLASS ACTION

This Document Relates To:

ALL ACTIONS.

PLAINTIFF'S NOTICE OF MOTION AND  
MOTION FOR PRELIMINARY APPROVAL  
OF CLASS ACTION SETTLEMENT,  
CONDITIONAL APPROVAL OF  
SETTLEMENT CLASS, ISSUANCE OF  
NOTICE TO THE CLASS, AND SETTING OF  
FAIRNESS HEARING AND MEMORANDUM  
OF POINTS AND AUTHORITIES IN  
SUPPORT THEREOF

DATE: April 22, 2011

TIME: 9:00 a.m.

CTRM: 6, 4th Floor

JUDGE: The Honorable Ronald M. Whyte

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1 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

2 PLEASE TAKE NOTICE that on April 22, 2011, at 9:00 a.m., before the Honorable  
 3 Ronald M. Whyte, in Courtroom 6, 4th Floor of the above-entitled Court, located at 280 South First  
 4 Street, San Jose, California, Plaintiff Friou P. Jones ("Plaintiff") will and hereby does move,  
 5 pursuant to Rule 23 of the Federal Rules of Civil Procedure, for an order: (1) preliminarily approving  
 6 the Settlement Agreement ("Agreement");<sup>1</sup> (2) conditionally certifying the Settlement Class;  
 7 (3) directing the dissemination of Class Notice of Settlement and the Fairness Hearing to the  
 8 members of the Settlement Class, attached as Exhibit B to the Settlement Agreement; and  
 9 (4) scheduling a date for the Fairness Hearing to consider whether to grant final approval of the  
 10 Settlement and application by Class Counsel for an award of attorneys' fees and expenses.

11 Plaintiff's motion is based on this notice of motion, the memorandum of points and  
 12 authorities in support of preliminary approval of class action settlement and conditional approval of  
 13 settlement class, the Court's file and such further oral and documentary evidence as may be  
 14 prevented at the hearing on the motion.

## 15 MEMORANDUM OF POINTS AND AUTHORITIES

### 16 I. INTRODUCTION

17 Under the guidance of a mediator, the Hon. Edward A. Infante (Ret.), the parties have  
 18 reached an agreement to settle the above-captioned class action litigation (the "Settlement") on the  
 19 terms set forth in the Agreement, dated April 15, 2011. For the reasons stated herein, Plaintiff  
 20 respectfully requests that the Court grant preliminary approval of the proposed Settlement, which  
 21 will provide substantial economic relief to more than 10,500 senior citizens (or their beneficiaries)  
 22 across the country who purchased deferred annuity products issued by Defendants Conseco  
 23 Insurance Company, Conseco Services, LLC, and Conseco Marketing, LLC ("Defendants").

24 At the preliminary approval stage, the Court makes only a preliminary determination on the  
 25 fairness, reasonableness, and adequacy of the settlement, so that notice of the settlement may be

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26  
 27 <sup>1</sup> The Agreement and related exhibits are attached as Attachment 1 hereto. Unless noted  
 28 otherwise, capitalized terms in this motion have the meanings assigned in the Agreement.



1 given to the Class and a fairness hearing may be scheduled to make a final determination regarding  
 2 the fairness of the settlement. *See* 4 William B. Rubenstein, Alba Conte & Herbert B. Newberg,  
 3 *Newberg on Class Actions*, §11:25 (4th ed. 2002); *Manual for Complex Litigation* (“*Manual*”)  
 4 §21.632 (Fourth) (2005). In so doing, the Court simply reviews the settlement to determine that it is  
 5 not collusive and, “taken as a whole, is fair, reasonable and adequate to all concerned.” *Officers for*  
 6 *Justice v. Civil Serv. Comm’n.*, 688 F.2d 615, 625 (9th Cir. 1982).<sup>2</sup>

7 The proposed Settlement plainly meets this standard. It is the product of lengthy and often  
 8 contentious negotiations between the parties, was assisted by an experienced and well-respected  
 9 mediator and will fairly resolve this litigation. The Settlement Class, which Plaintiff asks the Court  
 10 to conditionally certify, is comprised of individuals and trusts that have or had an ownership interest  
 11 in certain fixed deferred annuities issued by Defendants between November 27, 2001 through  
 12 March 1, 2010. The product names for those Annuities are listed in Exhibit A of the Agreement.  
 13 The members of the Class were age 65 or older on the Annuity’s date of issue (or if a trust, then at  
 14 least one Annuitant was age 65 or older on the Annuity’s date of issue). The Class does not include  
 15 persons who make a valid request for exclusion from the Class, nor those subject to other exclusions  
 16 set forth in §1.17 of the Agreement. As detailed below, the proposed Settlement compares favorably  
 17 with class settlements approved in similar cases involving the sale of deferred annuities. The  
 18 proposed Settlement appropriately reflects the strengths and weaknesses associated with Plaintiff’s  
 19 claims and provides finality and certainty to Defendants and the Class Members. The proposed  
 20 Settlement Class also satisfies all of the requirements for certification under Fed. R. Civ. P. 23, and  
 21 the proposed Class Notice satisfies all of the requirements of Rule 23(c)(2)(B) for providing the best  
 22 notice practicable under the circumstances.

23 Plaintiff therefore respectfully requests that the Court enter the [Proposed] Findings and  
 24 Order Preliminarily Approving Class Settlement, Directing Issuance of Notice to the Class, and  
 25 Setting of Fairness Hearing (the “Order”): (1) preliminarily approving the Settlement;  
 26 (2) conditionally certifying the Settlement Class; (3) directing the dissemination of Class Notice of

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27  
 28 <sup>2</sup> Unless otherwise noted, citations are omitted and emphasis is added.

the Settlement and the Fairness Hearing to the members of the Settlement Class; and (4) scheduling a date for the Fairness Hearing to consider whether to grant final approval of the Settlement, and the application by Class Counsel for an award of attorneys' fees and expenses.<sup>3</sup>

## **II. SUMMARY OF THE LITIGATION**

### **A. Plaintiff's Position**

On April 27, 2007, Plaintiff filed the operative complaint, the Second Amended Consolidated Class Action Complaint ("Complaint"), which asserted causes of action against Defendants for violations of civil RICO, 18 U.S.C. §1962(b)-(d); Financial Elder Abuse, Cal. Welf. & Inst. Code §15600 *et seq.*; Cal. Bus. & Prof. Code §17200 *et seq.*; and Cal. Bus. & Prof. Code §17500 *et seq.*, in connection with the marketing and sale of Conseco deferred annuities to senior citizens. Plaintiff alleges that Defendants utilized a network of sales agents to sell poorly-performing and illiquid deferred annuities to seniors citizens by presenting them with standardized sales materials that misrepresented or otherwise concealed the true costs and other adverse features of the annuities. Agreement at 1.

### **B. Defendants' Position**

Defendants deny any and all facts and claims alleged in the Action and further deny that Plaintiff, or any members of the class he purports to represent, have suffered any damage. *Id.* at 1.

### **C. Procedural Posture of the Case as of the Settlement**

Since the filing of the original class action complaint over five years ago, this matter has been aggressively litigated, as the parties have engaged in substantial motion practice and discovery. Defendants filed multiple motions to dismiss, resulting in a three-year battle over the sufficiency of the pleadings. Dkt. Nos. 18, 49, 88, 103. Defendants filed their answer to the Complaint on January 20, 2009. Dkt. No. 155.

On June 7, 2010, Plaintiff filed his motion for class certification. Defendants filed their opposition to class certification on August 23, 2010. Dkt. Nos. 177-182. Both parties submitted the declarations of experts to support their respective positions. Dkt. Nos. 188-194. The Court

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<sup>3</sup> The Order, attached as Exhibit C to the Agreement, is also being filed concurrently.

1 continued the deadline for the filing of Plaintiff's reply to allow the parties to engage in settlement  
2 discussions. Accordingly, the issue of class certification has not been resolved.

3 Discovery in this case has been extensive. In the course of the Action, Class Counsel have  
4 reviewed over 350,000 pages of documents, analyzed extensive data, and have taken the depositions  
5 of numerous Consecro executives and employees. Moreover, had settlement discussions not  
6 occurred, the parties would have engaged in extensive expert discovery.

#### 7 **D. Mediation and Negotiation of the Settlement**

8 The parties' Agreement is the product of intense arm's-length negotiations that spanned more  
9 than two years. In addition to direct settlement negotiations, the parties agreed to mediate the matter  
10 before the Hon. Edward A. Infante (Ret.) of JAMS to assist them in resolving difficult issues  
11 concerning the potential settlement benefits to the Class. Under Judge Infante's guidance, the parties  
12 worked many hours to reach the terms embodied in the Agreement. The parties have conducted their  
13 own investigation and evaluation of the relevant law and facts necessary to assess the strengths and  
14 weaknesses of Plaintiff's allegations and claim for damages, as well as Defendants' defenses. Based  
15 on these investigations, the parties have independently concluded that entering in the proposed  
16 Settlement is in their best interests.

### 17 **III. SUMMARY OF THE SETTLEMENT**

#### 18 **A. The Proposed Settlement Class**

19 Plaintiff requests the conditional certification of a Settlement Class, which includes:

20 Any person or trust who has not made a valid request for exclusion from the  
21 Settlement Class and who is, as of the Eligibility Date, or who was at the time of the  
22 Annuity's termination prior to the Eligibility Date, an Owner, as defined in this  
23 Agreement, of an Annuity, or a Beneficiary of a deceased Owner, provided that  
24 Defendants' records show that one of the Annuity's Owners as of the Eligibility Date  
25 is, or one of the Annuity's Owners at the time of termination was (a) a natural person  
26 who was age 65 or older on the Annuity's date of issue; or (b) a trust, and at least one  
27 Annuitant was age 65 or older on the Annuity's date of issue; except that, "Class  
28 Member," "Class Members," and "Settlement Class," do not include a person or trust  
(a) who is or was an Owner of an Annuity (i) that was issued but not accepted or was  
returned to the Company as part of the exercise of the free-look provision in the  
Annuity or was otherwise rescinded, (ii) that was surrendered in full without  
incurring any Surrender Charge, (iii) that was Annuitized and the Annuity Payments  
have ceased, or (iv) that was owned by a natural person under age 65, and in which  
no person age 65 or older had an ownership interest at the time of purchase; (b) who  
signed a document that released any of the Defendants from any further claims  
concerning the Annuity; (c) whose rights and claims respecting the Annuity have

1 been finally adjudicated in a court of law; (d) who is or was a member of the Board  
 2 of Directors, an officer, shareholder or employee of Defendants at any time during  
 3 the Class Period, as well as the parents, affiliates, legal representatives, attorneys,  
 4 successors, or assigns of Defendants; (e) who is a judge, justice, or judicial official  
 5 presiding over the Action or is with the staff or immediate family of such judge,  
 6 justice or official; (f) who is a person or entity hired to administer the terms of the  
 7 Settlement; and (g) which is a corporation or legal entity other than a trust or natural  
 8 person.

9 Agreement, §1.17.

## 10 **B. Economic Value of the Settlement to Class Members**

11 Pursuant to the terms of the Agreement, each member of the Settlement Class who chooses  
 12 not to be excluded will receive valuable economic benefits, depending on the status of the Class  
 13 Member's Annuity, in the form of either an Account Value Bonus, Annuitization Bonus, Bonus for  
 14 Surrendered Annuities, or Enhanced Death Benefit. *Id.*, §3.1. These settlement benefits are  
 15 intended to address Plaintiff's concerns about the alleged adverse features of Defendants' annuities,  
 16 including their alleged high, embedded costs and illiquidity.

17 Each of these benefits is intended as stand-alone Settlement relief; therefore, each Class  
 18 Member may receive only one of the benefits for each Annuity that he or she owns, owned, or is a  
 19 Beneficiary thereof. *Id.*

### 20 **1. Account Value Bonus**

21 A Class Member who is an Owner of an Active Deferred Annuity (*i.e.*, an Annuity that has  
 22 not been Annuitized, fully surrendered, returned under a "free-look" provision, or otherwise been  
 23 rescinded, or for which a death benefit has become payable) as of the Eligibility Date shall be  
 24 entitled to receive an Account Value Bonus with respect to that Annuity. Class Members who  
 25 qualify for the Account Value Bonus will receive a one-time additional interest payment, calculated  
 26 as the Applicable Percentage of the Accumulation Value added to the Accumulation Value, for each  
 27 Active Deferred Annuity. Agreement, §3.2 The Applicable Percentage, as used to determine the  
 28 Account Value Bonus, shall be 0.532% of the Accumulation Value of the Active Deferred Annuity;  
 provided, however, that the Applicable Percentage will be adjusted, if necessary, so that the total of  
 all settlement benefits paid by Defendants pursuant to this Agreement will be no more or no less than

1 the amount of \$2.25 million (excluding the cost of class notice and settlement administration, Class  
2 Counsel Payment and the service award). *Id.*, §1.12.

3 The additional interest payment, provided through the Account Value Bonus, will be  
4 calculated and credited to Class Members' Active Deferred Annuities as of the Implementation Date.  
5 The Account Value Bonus is separate and apart from any other guaranteed or non-guaranteed  
6 interest rate that may be credited to Class Members under the terms of their Annuity contracts or  
7 pursuant to company practice. *Id.*, §3.2

## 8 **2. Annuitization Bonus**

9 If a Class Member has Annuitized his or her Annuity on or prior to the Eligibility Date, then  
10 each remaining Annuity Payment after the Implementation Date will be increased by 2.5% relative  
11 to the amount scheduled to be paid in the absence of this Settlement. Agreement, §3.3.

## 12 **3. Bonus for Surrendered Annuities**

13 If a Class Member fully surrendered his or her Annuity on or prior to the Eligibility Date and  
14 that Annuity was subject to a Surrender Charge, the Class Member will receive a 0.4% increase to  
15 the amount of the withdrawal. Agreement, §3.4.

## 16 **4. Enhanced Death Benefit**

17 Any Annuity of which the Owner, who purchased his or her annuity during the Class Period  
18 and passed away on or prior to the Eligibility Date, shall be eligible for an increase of 0.5% to the  
19 death benefit amount provided under the Annuity. The Enhanced Death Benefit will be available to  
20 the Beneficiary or Beneficiaries of the Annuity, as specified by the terms of the Annuity contract,  
21 provided that each Beneficiary qualifies as a Class Member as defined in §1.17 of the Agreement  
22 and further provided that each eligible Beneficiary seeking the Enhanced Death Benefit completes,  
23 signs and submits to Conseco Services LLC, postmarked no later than 60 days after the mailing of  
24 the Class Notice, the Enhanced Death Benefit Claim Form appended to the Class Notice. When an  
25 Annuity includes multiple eligible Beneficiaries, the Enhanced Death Benefit will be divided among  
26 the Beneficiaries according to their respective interests, as designated in the Annuity. Regardless of  
27 the number of Beneficiaries designated in an Annuity, the Enhanced Death Benefit will not exceed  
28 0.5% of the death benefit amount provided under the Annuity. *Id.*, §3.5.

1           **C.      Class Notice**

2           The parties agree that Consecro Services, LLC shall act as the Settlement Administrator and  
3 provide notice to the Class Members, and otherwise assist in implementing the terms of the  
4 Agreement. Agreement, §1.37. The parties agree that the Settlement Administrator shall send to  
5 each Class Member by first-class mail, postage prepaid the Class Notice, no later than 28 days after  
6 the Preliminary Approval Order is entered by the Court. *Id.*, §4.1. The Class Notice shall:

7                   (a)      contain a concise statement of the background of the Action, the preliminary  
8 certification of the Class for settlement purposes and the proposed Settlement;

9                   (b)      describe each type of Settlement relief available to Class Members, including  
10 the Account Value Bonus, Annuitization Bonus, Bonus for Surrendered Annuities, and Enhanced  
11 Death Benefit, and the manner by which Class Members will qualify for each type of Settlement  
12 relief based on the status of their Annuities as of the Eligibility Date;

13                  (c)      advise Class Members of their right to exclude themselves from the Class, or  
14 to object to the proposed Settlement and the deadline for the same;

15                  (d)      advise that any judgment entered in the Action will be binding on all Class  
16 Members who do not exclude themselves from the Class;

17                  (e)      inform Class Members that they will be releasing the Released Claims (as  
18 defined in Section 7) under the Release, which will be reprinted verbatim in the Class Notice;

19                  (f)      inform Beneficiaries who are eligible for the Enhanced Death Benefit of the  
20 process to be followed in order to receive the Enhanced Death Benefit; and

21                  (g)      provide information about the award of attorneys' fees and expenses requested  
22 by Class Counsel.

23 *Id.*, §4.2

24           **D.      Release and Waiver**

25           It is the intent of the parties to forever settle and resolve this Action through the Settlement.  
26 Accordingly, Plaintiff and all settling Class Members who choose not to be excluded agree to a full  
27 and final release of all past or present claims, complaints, causes of action, allegations of liability,  
28 damages, restitution, equitable, legal or other interest, or demands or rights, whether known or

unknown, that concern, refer or relate to, or arise out of, in whole or in part any facts, events or transactions relating to the Annuities that have occurred or were in existence at any time prior to the entry of the Final Order Approving Class Action Settlement (“Final Order”), including, without limitation:

- (a) the offering of advice in any manner related to the Annuities;
- (b) the design, marketing, solicitation, sale, appropriateness or administration of the Annuities;
- (c) any disclosures or advertising related to the Annuities, whether written or oral;
- or
- (d) the calculation and availability of any accumulation or surrender values, or annuity payments, or the exercise of any rights under the Annuities.

Without limiting the foregoing, the parties’ Release includes, but is not limited to, all claims that were asserted in the Action, or that could have been asserted against Defendants before any court, arbitration panel, or regulatory or administrative agency based on or related to facts alleged in any of the complaints filed in this Action, whether or not brought directly, indirectly, on a representative basis, or otherwise. Agreement, §7.1

Moreover, the Agreement provides that Plaintiff will expressly waive any and all rights and benefits conferred by §1542 of the California Civil Code, or other similar statutes or principles of law on behalf of himself, and on behalf of the Class. *Id.*, §7.3

**E. Appointment of the Class Representative and Class Counsel and Payment of Attorneys’ Fees, Costs and Service Award Payment to the Class Representative**

The Agreement contemplates that the Court designate Plaintiff Friou P. Jones, as Class Representative of the Settlement Class. Agreement, §1.20. Defendant agrees that Plaintiff satisfies the requirements as Class Representatives for settlement purposes. *Id.*, §2.2(e). Defendants also agree that they will pay up to \$2,500 to Plaintiff as and for a service award, subject to approval by the Court. *Id.*, §8.1.

Defendants also agree to the appointment of Robbins Geller Rudman & Dowd, LLP, and Barrack Rodos & Bacine, as Class Counsel and that such appointment satisfies Rule 23(g) for



1 settlement purposes. *Id.*, §2.2(e). Finally, if the Settlement is approved by the Court, Class Counsel  
 2 will apply for an award for attorneys' fees and costs. Defendants agree to pay Class Counsel no  
 3 more than an aggregate amount of \$750,000 as an award of attorneys' fees and costs incurred in the  
 4 litigation, subject to Court approval. *Id.*, §8.2.

#### 5 **IV. THE PROPOSED SETTLEMENT MERITS PRELIMINARY APPROVAL**

##### 6 **A. The Settlement Is Fair, Reasonable and Adequate, and It Is Within 7 the Range of Possible Approval**

8 Strong judicial policy favors settlement of class actions. *Class Plaintiffs v. Seattle*, 955 F.2d  
 9 1268, 1276 (9th Cir. 1992); *In re NVIDIA Deriv. Corp. Litig.*, No. C-06-06110-SBA (JCS), 2008  
 10 WL 5382544, at \*2 (N.D. Cal. Dec. 22, 2008); *West v. Circle K Stores, Inc.*, No. CIV. S-04-0438  
 11 WBS GGH, 2006 WL 1652598, at \*1 (E.D. Cal. June 13, 2006). Settlements are particularly  
 12 favored "in class actions and other complex cases where substantial judicial resources can be  
 13 conserved by avoiding formal litigation." *NVIDIA*, 2008 WL 5382544, at \*2 (quoting *In re GMC*  
 14 *Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995)).

15 Approval of class action settlements normally proceeds in two stages: preliminary approval  
 16 followed by notice to the class, and then final approval. *Manual*, §21.632. The preliminary approval  
 17 stage requires the Court to "make a preliminary determination on the fairness, reasonableness, and  
 18 adequacy of the settlement terms." *Id.*, §21.632. At the preliminary stage, the Court need only  
 19 conduct a prima facie review of the relief and notice provided by the Agreement to determine that  
 20 notice should be sent to the settlement class members. *See id.* The Court's review is "limited to the  
 21 extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or  
 22 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a  
 23 whole, is fair, reasonable and adequate to all concerned." *Officers for Justice*, 688 F.2d at 625;  
 24 *accord Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998). This is a minimal threshold:

25 If the proposed settlement appears to be the product of serious, informed, non-  
 26 collusive negotiations, has no obvious deficiencies, does not improperly grant  
 27 preferential treatment to class representatives or segments of the class, and falls  
 28 within the range of possible approval, then the court should direct that the notice be  
 given to the class members of a formal fairness hearing.



1 *Young v. Polo Retail, LLC*, No. C-02-4546 VRW, 2006 WL 3050861, at \*5 (N.D. Cal. Oct. 25,  
 2 2006); *see, e.g., Satchell v. Federal Express Corp.*, Nos. C03-2659 SI, C 03-2878 SI, 2007 WL  
 3 1114010, at \*4 (N.D. Cal. Apr. 13, 2007) (granting preliminary approval after finding proposed  
 4 settlement was non-collusive, had no obvious defects and was within the range of possible settlement  
 5 approval). In making this determination, the Court should evaluate the fairness of the settlement in  
 6 its entirety. *See Hanlon*, 150 F.3d at 1026 (“It is the settlement taken as a whole, rather than the  
 7 individual component parts, that must be examined for overall fairness. . . . The settlement must  
 8 stand or fall in its entirety.”).

9 Here, the proposed Settlement plainly satisfies the standard for preliminary approval, as there  
 10 is no question as to its fairness, reasonableness and adequacy, placing it squarely within the range  
 11 of possible approval.

#### 12 **1. The Settlement Is the Product of Serious, Informed and Non-** 13 **Collusive Negotiations**

14 This Court is familiar with the long, adversarial history of this case. The Action was filed  
 15 over five years ago, discovery has been vigorous, and each side has amassed substantial factual and  
 16 expert testimony in support of their positions. There is no doubt that the parties have had ample  
 17 opportunity to evaluate the respective strengths and weaknesses of the Action.

18 Beyond the duration and intensity of the litigation, however, the mediation process  
 19 demonstrates that the Settlement was anything but collusive. *Adams v. Inter-Con Sec. Sys., Inc.*, No.  
 20 C-06-5428 MHP, 2007 WL 3225466, at \*3 (N.D. Cal. Oct. 30, 2007) (“The assistance of an  
 21 experienced mediator in the settlement process confirms that the settlement is non-collusive.”); *In re*  
 22 *Indep. Energy Holdings PLC*, No. 00 Civ. 6689(SAS), 2003 WL 22244676, at \*4 (S.D.N.Y.  
 23 Sept. 29, 2003) (“the fact that the Settlement was reached after exhaustive arm’s-length negotiations,  
 24 with the assistance of a private mediator experienced in complex litigation, is further proof that it is  
 25 fair and reasonable”). The parties, under the guidance of Judge Infante, negotiated intensely to reach  
 26 an agreement on the complicated and far-reaching issues set forth in the Agreement. The Settlement  
 27 is undoubtedly the product of good-faith, arm’s-length negotiations.  
 28

1                   **2.       The Proposed Settlement Has “No Obvious Deficiencies”**

2           The proposed Settlement “has no obvious deficiencies.” *Young*, 2006 WL 3050861, at \*5.  
 3 To the contrary, as described in detail below, the Settlement favorably compares to other settlements  
 4 of similar claims, yet is structured to address the specific shortcomings in Defendants’ annuities that  
 5 have been challenged by Plaintiff – providing valuable economic benefits, tailored to the  
 6 circumstances of Class Members, to remediate those shortcomings.

7                   **3.       The Proposed Relief Does Not “Grant Preferential Treatment**  
 8                   **to Class Representatives”**

9           Plaintiff does not receive any unduly preferential treatment under the settlement; with the  
 10 exception of a service award of up to \$2,500 to compensate for the time and effort devoted to  
 11 prosecuting the common claims, Plaintiff is treated the same as every other member of the  
 12 Settlement Class. *See, e.g., In re CV Therapeutics, Inc. Sec. Litig.*, No. C-03-3709 SI, 2007 WL  
 13 1033478, at \*3 (N.D. Cal. Apr. 4, 2007) (awarding \$26,000 to lead plaintiff).

14           Nor is there any concern that the proposed Settlement provides for excessive compensation to  
 15 Plaintiff’s counsel. The proposed Settlement contemplates a fee and expense award not to exceed  
 16 \$750,000. While the Ninth Circuit has held that a fee award of 25% of the settlement fund is an  
 17 appropriate starting point (or “benchmark”) for determining class action fees, that Court has  
 18 affirmed, and district courts have granted, awards of attorneys’ fees at or above a 30% fee. *See, e.g.,*  
 19 *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454 (9th Cir. 2000) (affirming fee award of 33 1/3% of  
 20 fund); *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (award of 33% of settlement  
 21 fund as fees affirmed).<sup>4</sup> Plaintiff will demonstrate in conjunction with the final approval hearing that  
 22 the requested \$750,000 fee and expense award is substantially less than the Ninth Circuit benchmark  
 23 of 25% of the estimated value of the settlement benefits. Moreover, the requested fee award is

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24           <sup>4</sup> *See also, e.g., CV Therapeutics*, 2007 WL 1033478, at \*1 (awarding fees of 30% of the  
 25 settlement fund on the basis that 30% is “consistent with awards made in similar cases”); *In re*  
 26 *Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 WL 1594403, at \*18-\*23 (C.D. Cal. June 10,  
 27 2005) (after noting that federal courts consistently award fees of 30% or higher, Court awarded fees  
 28 of 33 1/3% of settlement); *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1378 (N.D. Cal. 1989)  
 (“this court concludes that in class action common fund cases the better practice is to set a  
 percentage fee and that, absent extraordinary circumstances that suggest reasons to lower or increase  
 the percentage, the rate should be set at 30%”).

1 reasonable in light of the lodestar fees and expenses incurred by Plaintiff's counsel to date. Indeed,  
 2 Plaintiff's counsel's fee under the Settlement is especially modest in that it encompasses all *future*  
 3 post-approval work to be performed by counsel to effectuate the Settlement, such as claim  
 4 administration and any appeals. As the record will demonstrate, Plaintiff's requested fee is  
 5 appropriate and reasonable in light of the time, effort and resources expended to resolve this Action  
 6 and the substantial settlement benefits that Plaintiff's counsel will have achieved on behalf of Class  
 7 Members.

#### 8                   **4. The Proposed Relief Is Within the "Range of Possible** 9                   **Approval"**

10           The proposed Settlement also falls well within the "range of possible approval," as it  
 11 provides carefully-tailored economic benefits to all Class Members, without the risk and delays of  
 12 continued litigation, trial and appeal. The proposed relief offered under the Settlement specifically  
 13 addresses Defendant's alleged deceptive practices, including its alleged failure to disclose certain  
 14 costs of its annuities and its use of a product spread to recover those costs. The proposed Settlement  
 15 also addresses the surrender penalties and illiquidity allegedly associated with the annuities.  
 16 Settlement Class Members will be able to receive settlement relief through the Account Value  
 17 Bonus, Annuitization Bonus, Bonus for Surrendered Annuities, and Enhanced Death Benefit.

18           The proposed Settlement compares favorably with class settlements approved in similar cases  
 19 alleging misrepresentations in connection with the marketing and sale of deferred annuity products.  
 20 Indeed, the Account Value Bonus, Annuitization Bonus, Bonus for Surrendered Annuities, and  
 21 Enhanced Death Benefit offered under the proposed Settlement are more expansive and more  
 22 beneficial to Class Members than the corresponding relief afforded under other comparable  
 23 settlements. *See, e.g. In re Am. Investors Life Ins. Co. Annuity Mktg. & Sales Practices Litig.*, 263  
 24 F.R.D. 226 (E.D. Pa. 2009) (automatic annuitization bonus of 0.4% for contracts in deferral with  
 25 possible additional bonus up to 2% as part of claims process, with no waiver of penalties for  
 26 surrendered contracts); *Strube v. Am. Equity Inv. Life Ins. Co.*, 226 F.R.D. 688 (M.D. Fla. 2005) (2%  
 27 annuitization bonus for annuities with a minimum 10 year payout required and unspecified relief as  
 28 part of claims process).

Moreover, the Settlement is very similar to the class action settlements in *In re Midland National Life Ins. Co. Annuity Sales Practices Litig.*, MDL No. 07-1825 CAS(MANx) (C.D. Cal.) (“*Midland*”), and *Negrete v. Fidelity & Guar. Life Ins. Co.*, No. CV-05-6837-CAS(MANx) (C.D. Cal.) (“*F&G*”), both of which likewise involved the sale of costly, poorly performing and illiquid deferred annuities to senior citizens. The *Midland* and *F&G* settlements provided elderly class members relief in the form of enhancement to the annuity’s accumulation value, annuitization bonus, and surrender charge relief – settlement benefits that are very similar to the benefits proposed under this Settlement.<sup>5</sup> Pinter Decl., Ex. 1 (Final Order and Judgment, *F&G*, filed April 19, 2010); *id.*, Ex. 2 (Final Order Approving Class Action Settlement and Final Judgment of Dismissal with Prejudice Thereon, *Midland*, filed February 28, 2011).

Importantly, the proposed Settlement recognizes the inherent risks, costs and delay associated with the continued prosecution of this complex class action lawsuit. If this litigation were to proceed to trial, there is no guarantee against a defense verdict. Furthermore, even if a judgment were obtained against Defendants at trial, the recovery might be of no greater value to the Class and indeed might be substantially less valuable than the proposed Settlement. And even if Plaintiff and the Class ultimately prevailed, it could be years before Class Members would receive any recovery, given the likelihood of appeals. Moreover, in negotiating the proposed Settlement, Plaintiff was mindful of Defendants’ obligations to existing policyholders. The proposed Settlement is the best vehicle to assure Class Members receive the relief with respect to the alleged conduct in a prompt and efficient fashion.

Indeed, the price of delay is particularly high in this litigation because it was brought on behalf of elderly consumers who may not be able to wait years for relief. Thus, although the parties have already engaged in protracted litigation, continuation of the litigation would be extremely expensive and risky, and in the absence of the proposed Settlement, senior annuity purchasers would

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<sup>5</sup> See Declaration of Theodore J. Pinter in support of Plaintiff’s Motion for Preliminary Approval of Class Action Settlement, Conditional Approval of Settlement Class, Issuance of Notice to the Class, and Setting of Fairness Hearing (“Pinter Decl.”), filed concurrently.

1 have to wait substantially longer before they obtain any relief, even assuming Plaintiff successfully  
 2 overcame every obstacle to relief.

3 Without question, the parties worked long and hard to achieve a comprehensive settlement  
 4 that provides valuable and far-reaching benefits for the Class. There is no reason to doubt the  
 5 fairness, reasonableness and adequacy of the proposed Settlement, which is surely within the range  
 6 of possible approval.

7 **B. The Court Should Conditionally Certify the Settlement Class**

8 The Settlement Class should also be conditionally certified under Federal Rules of Civil  
 9 Procedure, Rules 23(a) and (b)(3).

10 **1. The Requirements of Rule 23(a) Are Met**

11 **a. Rule 23(a)(1) Is Satisfied**

12 Rule 23(a)(1) requires that a class be sufficiently numerous such “that joinder of all members  
 13 is impractical.” The Settlement Class encompasses more than 10,500 annuity policies, therefore  
 14 satisfying the impracticability standard. *See, e.g., Zhu v. Fujitsu Group 401(K) Plan*, No. C-03-  
 15 1148RMW, 2004 WL 3252573, at \*5 (N.D. Cal. Mar. 3, 2004) (class of approximately 139 members  
 16 sufficient to meet numerosity requirement); *In re Emulex Corp. Sec. Litig.*, 210 F.R.D. 717, 719  
 17 (C.D. Cal. 2002); *In re Adobe Sys., Inc. Sec. Litig.*, 139 F.R.D. 150, 153 n.4 (N.D. Cal. 1991)  
 18 (numerosity requirement clearly satisfied by allegation that hundreds if not thousands of class  
 19 members traded Adobe securities during class period).

20 **b. Rule 23(a)(2) Is Satisfied**

21 Commonality is readily satisfied because Plaintiff’s claims are based on an alleged common  
 22 fraudulent scheme by Defendants to market and sell their deferred annuities to senior citizens, using  
 23 standardized written sales materials that misrepresented and concealed their high cost, poor  
 24 performance and illiquidity. *See, e.g., McPhail v. First Command Fin. Planning, Inc.*, 247 F.R.D.  
 25 598, 608 (S.D. Cal.) (Gonzalez, J.) (“The Ninth Circuit applies a ‘common course of conduct’ test to  
 26 determine whether to certify a class in a fraud case.”) (citing *Blackie v. Barrack*, 524 F.2d 891, 903-  
 27 04 (9th Cir. 1975)); *Westways World Travel, Inc. v. AMR Corp.*, 218 F.R.D. 223, 238-39 (C.D. Cal.

2003) (common questions include whether “the common omissions and misrepresentations made by the [defendants] were material”).

**c. Rule 23(a)(3) Is Satisfied**

The typicality requirement is easily met because Plaintiff and the members of the proposed Class assert precisely the same claims, all arising from Defendants’ alleged overarching fraudulent scheme to market and sell costly, inferior annuities to seniors. *McPhail*, 247 F.R.D. at 610 (“The same sales pitch, strategy, and scheme that injured the named plaintiffs likewise injured the absent class members.”); *Schlagal v. Learning Tree Int’l*, No. CV98-6384 ABC (EX), 1999 WL 672306, at \*3 (C.D. Cal. Feb. 23, 1999) (typicality met where the plaintiff’s claims “stem from the same event or course of conduct as other class members’ claims and are based on the same legal theory as the absent members”).

**d. Rule 23(a)(4) Is Satisfied**

Rule 23(a)(4) requires that “the representative parties will fairly and adequately protect the interests of the class.” In the Ninth Circuit, Rule 23(a)(4) is satisfied where: (i) counsel for the class is qualified and competent to vigorously prosecute the action; and (ii) the interests of the proposed class representatives are not antagonistic to the interests of the Class. *See, e.g., Staton v. Boeing*, 327 F.3d 938, 957 (9th Cir. 2003).

The requirements of Rule 23(a)(4) are plainly met in this Action. First, Plaintiff’s counsel are qualified and experienced in class action litigation and have performed extensive work to date in identifying and investigating potential claims in this Action, preparing a detailed class action complaint, successfully opposing Defendants’ motions to dismiss, pursuing extensive party and third-party discovery, and successfully mediating and negotiating the proposed Settlement. *See Emulex*, 210 F.R.D. at 720 (court evaluating adequacy of counsel’s representation may examine “the attorneys’ professional qualifications, skill, experience, and resources . . . [and] the attorneys’ demonstrated performance in the suit itself”). Second, there is no conflict between Plaintiff’s interests and the interests of the Settlement Class Members. Plaintiff and the members of the Settlement Class assert the same legal claims, and their alleged losses arise out of the same course of conduct by Defendant during the Settlement Class Period.

**2. The Requirements of Rule 23(b)(3) Are Met**

The Court may certify a class if it determines that: (1) questions of law or fact common to the members of the class predominate over any questions affecting only individual members; and (2) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

**a. Common Questions of Law and Fact Predominate**

This case falls within the category of cases traditionally found suitable for class certification because Plaintiff would seek to demonstrate the existence of a centrally orchestrated fraudulent scheme to sell deferred annuities to seniors through the use of uniformly misleading sales documents. *See Negrete v. Allianz Life Ins. Co. of N. Am.*, 238 F.R.D. 482, 496 (C.D. Cal. 2006) (certifying annuity class action based on misrepresentations in company's standardized sales materials). Schemes predicated on centrally orchestrated frauds, "especially frauds predicated upon documents," are traditionally found "suitable for class action treatment." *Chisolm v. TranSouth Fin. Corp.*, 194 F.R.D. 538, 564 (E.D. Va. 2000); *see also In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 314 (3d Cir. 1998) (predominance readily met in case involving common scheme to defraud millions of life insurance policyholders); *Buoniconti v. Bankers Sec. Life Ins. Soc'y.*, No. 81 C 6630, 1985 WL 1377 (N.D. Ill. May 16, 1985) (certifying claims based on alleged failure to disclose adverse tax consequences of annuity contracts, where despite variations in sales presentations, the same basic misrepresentations and omissions were made to all annuity purchases). As the Supreme Court has observed, the predominance test is "readily met in certain cases alleging . . . consumer . . . fraud." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625, 117 S. Ct. 2231, 138 L. Ed. 2d 687 (1997).

**b. A Class Action Is Superior to Individual Actions**

Superiority is demonstrated where "classwide litigation of common issues will reduce litigation costs and promote greater efficiency." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). Rule 23(b)(3) sets forth factors for determining whether "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). As explained by the Ninth Circuit in *Zinser v. Accufix Research Inst., Inc.*, 253



1 F.3d 1180 (9th Cir. 2001), “consideration of these factors requires the court to focus on the  
 2 efficiency and economy elements of the class action so that cases allowed under subdivision (b)(3)  
 3 are those that can be adjudicated most profitably on a representative basis.” *Id.* at 1190.

4 Rule 23(b)(3)’s four “superiority” factors weigh heavily in favor of class certification here.  
 5 Liability in this action will turn on whether Defendants engaged in a common course of fraudulent  
 6 conduct and a conspiracy to increase market share and/or profits by specifically targeting and  
 7 exploiting seniors for the sale of poorly-performing deferred annuities. As demonstrated by the  
 8 dearth of individual lawsuits, it is neither economically feasible nor judicially efficient for 10,500  
 9 seniors to pursue their claims against Defendants on an individual basis. *See, e.g., GMC Pick-Up*  
 10 *Truck*, 55 F.3d at 784.

11 Accordingly, the proposed Settlement of the Action on a class-wide basis is a fair and  
 12 efficient method to resolve the claims of all putative Class Members without burdening the judiciary  
 13 system with a multiplicity of duplicative lawsuits.

14 **c. The Court Should Appoint Lead Counsel as Counsel for**  
 15 **the Settlement Class**

16 Rule 23(g)(1) requires the Court to appoint counsel to represent the interests of the class. *In*  
 17 *re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 355 (N.D. Cal. 2005). For the reasons stated  
 18 above in connection with the adequacy requirements of Rule 23(a)(4), and as has been demonstrated  
 19 thus far in this litigation, the law firms retained by Plaintiff to prosecute this class action are well  
 20 equipped to vigorously, competently and efficiently represent the proposed Settlement Class. The  
 21 Court should accordingly appoint Robbins Geller Rudman & Dowd LLP, and Barrack Rodos &  
 22 Bacine, as Class Counsel for the Settlement Class.

23 **d. The Proposed Class Notice Satisfies Rules 23 and All**  
 24 **Due Process Requirements**

25 Class Counsel proposes that mailed notice be given in the form of the Class Notice, attached  
 26 as Exhibit B to the Settlement Agreement. *See also* §III.C, above. Notice to the Class in the form  
 27 and in the manner set forth in the proposed notice will fulfill any requirements of due process that  
 28 may apply, comply with the Federal Rules of Civil Procedure, and alert and inform Class Members  
 of the Settlement and their opportunity to appear and be heard at the Fairness Hearing.



1 Notice must be “reasonably calculated, under all the circumstances, to apprise interested  
 2 parties of the pendency of the action and afford them an opportunity to present their objections.”  
 3 *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865  
 4 (1950). Plaintiff here proposes to give interested parties notice by first-class mail, addressed to all  
 5 Class Members who can reasonably be identified and located through Defendants’ records. In  
 6 addition, the parties will make information concerning the Settlement, including the Class Notice,  
 7 the Preliminary Approval Order, and other pertinent documents, available via a dedicated website.  
 8 Courts have regularly approved similar notice arrangements. *See, e.g., In re OCA, Inc. Sec. & Deriv.*  
 9 *Litig.*, No. 05-2165, 2008 WL 4681369, at \*16 (E.D. La. Oct. 17, 2008) (“direct mailing of notice,  
 10 along with publication of Summary Notice in print and on the web, is reasonably calculated to  
 11 apprise class members of the settlement”). The parties’ notice program, which is intended to give all  
 12 Class Members direct notice of the Settlement, is reasonably calculated and satisfies all due process  
 13 requirements.

14 The content of the Class Notice also meets all of the requirements of Rule 23(c).  
 15 Specifically, the Class Notice “clearly and concisely state[s] in plain, easily understood language,” in  
 16 accordance with Rule 23(c)(2)(B): the nature of the action; the definition of the class certified; the  
 17 class claims, issues, or defenses; that a Class Member may enter an appearance through an attorney  
 18 if the Class Member so desires; that the court will exclude from the class any Class Member who  
 19 requests exclusion; the time and manner for requesting exclusion, and the binding effect of a class  
 20 judgment on Class Members under Rule 23(c)(3). Fed. R. Civ. P. 23(c)(2)(B).

21 The Class Notice clearly describes the terms of the Settlement, the considerations that caused  
 22 Plaintiff’s counsel to conclude that the Settlement is fair and adequate, the maximum counsel fees  
 23 and expenses that may be sought, the procedure for objecting to the Settlement and the date and  
 24 place of the Settlement Fairness Hearing. The Class Notice will, when mailed as suggested, fairly  
 25 apprise Class Members of the Settlement and their options with respect thereto.

## 26 **V. CONCLUSION**

27 For the reasons set forth above, Plaintiff respectfully requests that the Court: (1) preliminarily  
 28 approve the Settlement; (2) conditionally certify the Settlement Class; (3) direct the dissemination of

Class Notice of the Settlement and the Fairness Hearing to the members of the Settlement Class; and  
 (4) schedule a date for the Fairness Hearing to consider whether to grant final approval of the Settlement, and the application by Class Counsel for an award of attorneys' fees and expenses. In addition, in connection with the approval of the Settlement and Class Notice, the parties request approval of the following schedule:

Event	Event Date
Hearing on Preliminary Approval	April 22, 2011
Eligibility Date	The day following entry of the Preliminary Approval Order
Mailing of Class Notice	28 days after entry of the Preliminary Approval Order
Class Counsel files petition for approval of the Class Counsel Payment	20 days after mailing of the Class Notice
Exclusions and Objections must be postmarked and sent to the Administrator and filed with the Court; Requests to appear and be heard at the Fairness Hearing must be served on Class Counsel and Defendants' Counsel and filed with the Court	45 days after mailing of the Class Notice
All Claim Forms for the Enhanced Death Benefit must be postmarked and sent to the Administrator	60 days after mailing of the Class Notice
Administrator files with the Court and serves counsel with notice specifying those Claimants who have objected or requested exclusion	60 days after mailing of the Class Notice
Fairness Hearing	To be set by Court but not less than 100 days after entry of the Preliminary Approval Order
Entry of the Final Order	To be determined
Submission by Defendants of Class Counsel Payment and Service Award	10 days after entry of Final Order
Final Settlement Date	The date on which the Final Order approving the Settlement Agreement becomes final for all purposes, including appeal.
Implementation Date – the date upon which the settlement benefits become available to the class	30 days following the Final Settlement Date

Event	Event Date
Class Counsel destroys all Confidential Information	30 days following the Final Settlement Date

DATED: April 19, 2011

Respectfully submitted,

ROBBINS GELLER RUDMAN  
& DOWD LLP  
JOHN J. STOIA, JR.  
THEODORE J. PINTAR  
PHONG L. TRAN  
RACHEL L. JENSEN  
STEVEN M. JODLOWSKI

s/ Theodore J. Pintar  
THEODORE J. PINTAR

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Telephone: 619/231-1058  
619/231-7423 (fax)

DATED: April 19, 2011

BARRACK, RODOS & BACINE  
STEPHEN R. BASSER  
SAMUEL M. WARD

s/ Stephen R. Basser  
STEPHEN R. BASSER

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Interim Co-Lead Counsel for Plaintiff

### ECF CERTIFICATION

The filing attorney attests that he has obtained concurrence regarding the filing of this document from the signatories to this document.

Dated: April 19, 2011

By: s/ Theodore J. Pintar  
THEODORE J. PINTAR

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2011, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 19, 2011.

s/ Theodore J. Pintar

THEODORE J. PINTAR

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## Mailing Information for a Case 5:05-cv-04726-RMW

### Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

- **Stephen R. Bassar**  
sbassar@barrack.com,lnapoleon@barrack.com,cfessia@barrack.com
- **Thomas A. Doyle**  
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- **James J Dries**  
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- **Andrew S. Friedman**  
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### Manual Notice List

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